In the Supreme Court of the United States.

OCTOBER TERM, 1914.

THE UNITED STATES, PETITIONER,
v.
NORTHERN PACIFIC RAILWAY COMPANY. } No. ——.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT, AND BRIEF THEREON.

To the Supreme Court of the United States:

The Solicitor General, on behalf of the United States, prays for a writ of certiorari to review the judgment of the Circuit Court of Appeals for the Eighth Circuit in the above-entitled cause.

QUESTION PRESENTED.

The question presented is whether a carrier which is subject to the Hours-of-Service Act of March 4, 1907, 34 Stat. 1415, and which is required to report to the Interstate Commerce Commission within 30 days after the end of each month all instances where employees have been on duty longer than the statutory period, is liable to the penalty

prescribed for a failure to file such report where it has omitted from the report as filed certain instances of excessive service, under the belief, as alleged, that such instances did not come within the Hours-of-Service Act.

The Circuit Court of Appeals took the view that the railroad company under the circumstances described was not so liable.

THE FACTS.

The case was heard and determined in the District Court upon motion for judgment on the pleadings (R. 12). The undisputed facts are that certain employees of respondent were called at 8.10 p. m. on October 29, 1911, to move a wrecker train. It was ascertained, however, that this train would not be needed, and the crew were notified upon reporting for duty that their services would not be required until 10.35 p. m. of the same day. From 8.10 to 10.35 p. m. they did not render any service to respondent "save that they kept alive the fire in the engine during said period." At the latter hour, the crew again reported for duty and left on a special freight train which, on account of hot boxes, was delayed 65 minutes and did not reach its destination until 1.15 p. m. on October 30. The railroad company did not consider that these facts constituted excess service under the law, and consequently failed to include them in its monthly report to the Commission (R. 9–11).

The District Court rendered judgment in favor of the United States for $500 damages, being the sum of penalties of $100 each sued for by the United States for respondent's failure upon five successive days to report the transaction in question (R. 1–8, 12).

Section 20 of the Act to Regulate Commerce as amended June 18, 1910, 36 Stat. 539, 556, provides in part as follows:

> * * * if any carrier, person, or corporation subject to the provisions of this Act shall fail to make and file said annual reports within the time above specified, or within the time extended by the commission, for making and filing the same, or shall fail to make specific answer to any question authorized by the provisions of this section within thirty days from the time it is lawfully required so to do, such party shall forfeit to the United States the sum of one hundred dollars for each and every day it shall continue to be in default with respect thereto. The commission shall also have authority by general or special orders to require said carriers, or any of them, to file monthly reports of earnings and expenses, and to file periodical or special, or both periodical and special, reports concerning any matters about which the commission is authorized or required by this or any other law to inquire or to keep itself informed or which it is required to enforce; and such periodical or special reports shall be under oath whenever the commission

so requires; and if any such carrier shall fail to make and file any such periodical or special report within the time fixed by the commission, it shall be subject to the forfeitures last above provided.

Acting under the authority conferred by this section the Commission, on June 28, 1911, issued the following order:

> *It is ordered,* That all carriers subject to the provisions of the Act entitled "An Act to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon," approved March 4, 1907, report within 30 days after the end of each month, under oath, all instances where employees subject to said Act have been on duty for a longer period than that provided in said Act (R. 6).

REASON FOR THE ALLOWANCE OF THE WRIT.

The present petition is preferred at the request of the Interstate Commerce Commission, and the question involved is believed by it to be of great importance in the enforcement of the Act to Regulate Commerce. By section 20 of that act the Commission is authorized to require various reports of carriers. If the decision in the instant case is followed, and any report rendered within the required time, whether true or false, complete or incomplete, is held to constitute a compliance with the section, there is little check upon the exercise of the discretion of carriers in this regard. At all

events, it is desirable that the question be authoritatively settled in order that the Commission may know its power in the premises.

BRIEF IN SUPPORT OF THE PETITION.

1. Since the amount in issue is less than $1,000, this case cannot be brought to this court by writ of error under section 241 of the Judicial Code. Under such circumstances, although the judgment of the Circuit Court of Appeals remanding the case to the District Court for further proceedings is not final, this court undoubtedly has power to issue the writ of certiorari.

Forsyth v. *Hammond,* 166 U. S. 506, 514–515.

St. Louis, K. C. & C. Ry. Co. v. *Wabash R. R. Co.,* 217 U. S. 247, 251.

2. The order of the Interstate Commerce Commission which was here violated was within the authority of that body, being authorized by section 4 of the Hours-of-Service Act and section 20 of the Act to Regulate Commerce as amended. *Balto. & Ohio R. R. Co.* v. *Interstate Com. Comm.,* 221 U. S. 612, 620.

3. The instance involved in this case is undoubtedly excessive service within the meaning of the Hours-of-Service Act. Indeed the respondent has already been prosecuted and paid the penalty therefor, which judgment is not and could not be complained of in the light of the decision of this court.

In *Missouri, K. & T. Ry. Co.* v. *United States,* 231 U. S. 112, it was contended that a delay occurring while the engine was sent off for water and repairs, during which time the men were waiting, doing nothing, should be deducted from the total period, as the men were not on duty during that time. Upon that point this court, through Mr. Justice Holmes, said (p. 119):

> * * * But they were under orders, liable to be called upon at any moment, and not at liberty to go away. They were none the less on duty when inactive. Their duty was to stand and wait.

Surely the employes engaged in the task of keeping alive the fire in the engine between 8.10 and 10.35 p. m. in the present case were as much "on duty" as those waiting for an engine.

For the purposes of the present case, it is immaterial whether respondent would be entitled to a deduction for the period of delay caused by hot boxes under the proviso of section 3 if prosecuted for violating the Hours-of-Service Act, since obviously the report required by the Commission is to include *all* cases of excessive service, whether with or without justification.

4. We therefore come to the principal question—whether respondent's failure to report the instance of excessive service in question was a violation of section 20 of the Interstate Commerce Act for which the United States can recover $100 a day.

In this connection the language of the Commission's order is worth noting. The carrier is required to " report within 30 days after the end of each month * * * *all instances* where employes * * * have been on duty for a longer period than that provided in said Act." This order would be fulfilled either by a single report containing all instances of excessive service or by a separate report for each such instance. It is not complied with, however, by a report containing all instances but one. In short, the thing required by the Commission is certain information and not merely a compliance with a certain monthly formality.

It follows that the carrier was in default with respect to its failure to make the report required by the Commission within the time fixed, and therefore incurred the penalty of $100 a day for such default provided by section 20.

Such has been the construction heretofore tacitly given to the section by the District Court in a suit by the United States to recover a penalty for a similar default. *United States* v. *Chicago, M. & P. S. Ry. Co.* (D. C. Wash.), 195 Fed. 783. See also, *United States* v. *Yazoo & M. V. R. Co.* (D. C. W. D. Tenn.), 203 Fed. 159.

While we have found no direct authority upon the question here presented, analogies are not wanting. In *Phile* v. *The Anna,* 1 Dall. 197, 205, under a statute providing that " every vessel or boat,

from which any goods, wares or merchandise shall be unladed, before due entry thereof at the office of the collector of the port * * * shall be forfeited," and that " the master of any ship or vessel shall exhibit to the collector a true manifest of the goods, wares and merchandise imported in such ship or vessel, and swear that there are no other on board, to the best of his knowledge and belief," it was held that the offense involving forfeiture of the vessel was committed by the delivery of a false manifest. The court said (p. 205):

> * * * if the master is obliged by law to deliver in a manifest, he does not comply, unless he exhibits a true and accurate one; and his committing perjury upon the occasion, so far from saving the vessel, must greatly increase the offence.

Again, in *134,901 Feet of Pine Lumber,* 4 Blatch. 182, under a similar statute, it was held that it was immaterial whether the master of the vessel presented a false manifest or none at all.

The Circuit Court of Appeals in the instant case relied largely on the hardship which would ensue as a consequence of the construction of section 20 for which we contend. But that is obviously a question for the consideration of Congress, and should not weigh against the clear language of the section. That language does not seem to us open to the construction placed upon it by the Circuit Court of Appeals. For the purposes of the section, a failure

to report any instance of excessive service is a failure to make a report required by the Commission; and it is immaterial whether or not that failure takes the form of an omission from a monthly report. Under any other interpretation, the statute inevitably gives the carrier a free hand in concealing violations of the Hours-of-Service Act, without any recourse for the Government except punishment of the officer who verifies the report under oath on the charge of perjury in case knowledge on his part of its falsity can be shown. We submit that Congress did not intend thus to nullify the investigatory power of the Commission under section 20, or that the Commission in requiring such reports is doing a vain thing.

5. The Circuit Court of Appeals placed much reliance on the circumstance that the failure to report was in good faith. We cannot see the materiality of this circumstance. It was assumed to be immaterial in *United States* v. *Chicago, M. & P. S. Ry. Co., supra.* It is not denied that the carrier knew the circumstances of the instance of excessive service in question; it is alleged, however, that it did not understand that the instance was in fact a violation of the statute, or that it was necessary that the same should be included in its report (R. 11). In other words, the carrier made a mistake of law; and no reason is seen for giving such a mistake any other or different effect in this than in other cases. This is not the kind of statutory

offense where evil intent is necessary; a mere intent to fail to do the thing required by the statute is enough. Cf. *Chicago, B. & Q. Ry. Co.* v. *United States,* 220 U. S. 559; *Armour Packing Co.* v. *United States,* 209 U. S. 56, 85.

It is therefore respectfully submitted that a writ of certiorari should issue as prayed.

JOHN W. DAVIS,
Solicitor General.

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